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IN THE
Supreme Court of the United States

OCTOBER TERM, 1949.

No. 71 Original
FEDERAL POWER COMMISSION,
Petitioner,
v.

THE EAST OHIO GAS COMPANY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

MEMORANDUM IN SUPPORT OF PETITIONS FOR
REHEARING SUBMITTED ON BEHALF OF THE
STATE OF NEW MEXICO, AND NEW MEXICO
PUBLIC SERVICE COMMISSION, AMICI CURIAE.

TO THE HONORABLE SUPREME COURT OF THE
UNITED STATES:

Comes now the State of New Mexico, and New Mexico
Public Service Commission, amici curiae, and present this
memorandum in support of the petitions for rehearing pre-
sented by the Respondents in the above entitled cause, and,
in support thereof, respectfully show:

I.

The State of New Mexico and New Mexico Public Service Commission reiterate each and every point and argument submitted in the memorandum in support of petitions for rehearing submitted in behalf of the National Association of Railroads and Utilities Commissioners, and certain state regulatory commissions, amici curiae.

II.

The State of New Mexico and New Mexico Public Service Commission, alarmed over the continuous invasion of states' rights and states' regulatory power by increasing Federal control, cannot reconcile the majority opinion with the previous opinions of the Honorable Court and the arguments as set forth in the minority opinion which are extensively quoted as follows:

1. ". . . . Hence, the states appealed to Congress to set up machinery to fix the import price of out-of-state gas." This was all that the states asked the Federal Government to do, and it is everything that the Federal Power Commission revealed any purpose to do while the legislation was pending.

2. Quoting the Solicitor of the Federal Power Commission: "The whole purpose of this bill is to bring under federal regulation the pipe lines and to leave to the state commissions control of distributing companies and over their rates, whether that gas moves in interstate commerce or not."

3. "That is what the state authorities active in promoting the legislation seem to have believed had been accomplished."

4. "How much farther than the order here under

review the Commission will go in supplanting a duplicating state regulation is not clear from its argument, and how far it can go is rendered unclear by the Court's opinion which expressly approves some overlapping but leaves its bounds in carefully stated doubt. The anxiety which this program stirs among other states is explained by its magnitude."

5. "This is a real conflict in which experience shows state control will wither away and leave the federal rule in possession of the field."

6. "This court can sustain such overlapping and overriding of the states' authority *only* by repudiating its own recent statements."

(a) "Congress meant to create a comprehensive scheme of regulation that would be *complementary* in its operation to that of the states, without any confusion of functions." Public Utilities Comm. v. United Fuel Gas Co., 317 U. S. 456, 467.

(b) "In a later case, quoting H. R. Rep. No. 709, 75th Congress, 1st Session, we said that 'the bill was so designed to take no authority from state commissions' and was 'so drawn as to complement and in no manner usurp state regulatory authority.'" Federal Power Comm. v. Hope Natural Gas Co., 320 U. S. 591, 610.

(c) "And only last year we observed that the Natural Gas Act was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other." Federal Power Commission v. Panhandle Eastern Pipe Line Company, 337 U. S. 498, 513.

7. "The Court finds the dividing line of jurisdiction to

be drawn by physical characteristics of the transmission lines. It seizes upon the point where high pressure at which gas is transmitted any substantial distance is reduced to low pressure at which it must be served to customers' burners through the community supply lines as the outer limits of the 'local' area reserved to the states."

"It is interesting to note that the H. R. 11662 contained 'only if such distribution was from low pressure mains'. But the Natural Gas Act, as passed, eliminated 'low pressure' or any reference to pressure."

8. "The pressure reduction station now relied upon to limit 'local' had lost its standing even in tax cases and never was accepted in regulation cases."

9. "With this approach, today's decisions confine the states' regulatory power to the service area, bounded by the low-pressure transmission system, which means practically within the city gates."

10. "However, this pressure factor is one which we found immaterial in *Interstate Natural Gas Co. v. Federal Power Comm.*, supra 689, where, with rare unanimity, we put our emphasis upon the fact of sale for resale in interstate commerce. But today it is the difference between retail and wholesale operations which is termed immaterial, so long as the factor of high-pressure pipe line is present."

11. "And we went on to say that the purpose of the legislation was to make state regulation effective 'by adding the weight of federal regulation to supplement and reinforce it in the gap created by prior decisions. . . .'"

12. ". . . . less than two months before the passage of the Natural Gas Act, the Court, through the pen of Mr. Chief Justice Hughes, in a case not cited by the Court, de-

clared that such transmission lines were properly within the sphere of state rate-making powers. *Lone Star Gas Co. v. Texas*, 304 U. S. 224."

13. "It seems to me that the obvious answer is that intrastate transmission lines, of a retail company, devoted exclusively to serving communities within the state are facilities used in the local distribution of natural gas and are accordingly excepted from application of the Act."

14. "*It's 'but' clause was Congress' assurance to the state bodies sponsoring the legislation that federal control would not extend to the area within their authority. cf. Connecticut Light-Power Co. v. Federal Power Comm., 324 U. S. 515, 527.*" (Emphasis ours)

15. ". that Congress in passing this Act froze into law current judicial decisions. *It keeps faith with the States.*" (Emphasis ours)

16. "Of course, this solution does not render meaningless the 'transportation of natural gas in interstate commerce.' "it would be logical enough to give the Federal Power Commission, under above 'transportation clause,' exclusive jurisdiction over the main transmission lines of a retail gas company which ran through Ohio and on into New York; but could leave to Ohio exclusive jurisdiction over lateral lines branching out from the main trunk in Ohio, and whether one or one hundred miles long, devoted exclusively to delivering gas to the burner tips in Ohio communities."

17. "What the Power Commission asks the Court to do today is not to fill the gap in the states power to regulate, for there is none, but to create a gap in order to make room for federal power."

18. "As Mr. Justice Brandeis said, 'It is one of the

happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.' New State Ice Co. v. Liebmann, 285 U. S. 262, 311. Long before the Federal Government could be stirred to regulate utilities, courageous states took the initiative and almost the whole body of utility practice has resulted from their experiences."

19. We conclude our memorandum with this thought expressed in the dissenting opinion:

"I think that observance of good faith with the states requires that we interpret this Act as it was represented at the time they urged its enactment, as its term read, and as we have, until today, declared it, viz, *to supplement but not to supplant state regulation*. What amounts to an entrapment of the state agencies that supported this Act under the representation that it would not deprive them of powers but would only make their powers effective will probably not make it easier to get needed regulatory legislation in the future."

CONCLUSION

It is respectfully urged that the petitions for rehearing be granted and that the decree of the United States Court of Appeals for the District of Columbia be, upon further consideration, affirmed.

Respectfully submitted,

JOE L. MARTINEZ

Attorney General of New Mexico

PHILIP H. DUNLEAVY

PETER N. CHUMBRIS

Assistant Attorneys General

Feb. 10, 1950

CERTIFICATE OF COUNSEL

We, Attorneys for the State of New Mexico and New Mexico Public Service Commission, amici curiae, do hereby certify that the foregoing memorandum in support of the petitions for rehearing in this cause is presented in good faith, and not for delay.

JOE L. MARTINEZ

Attorney General of New Mexico

PHILIP H. DUNLEAVY

PETER N. CHUMBRIS

A sistant Attorneys General